No. 15-60588

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

KATCH KAN USA, L.L.C.,
Petitioner/Cross-Respondent,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent/Cross-Petitioner.

ON PETITION FOR REVIEW FROM THE DECISION AND ORDER OF THE NATIONAL LABOR RELATIONS BOARD, BOARD CASE NO. 16-CA-134743

REPLY BRIEF OF PETITIONER/CROSS-RESPONDENT, KATCH KAN USA, L.L.C.

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CERTIFICATE OF INTERESTED PERSONS AND ENTITIES

No. 15-60588
Katch Kan USA, L.L.C. v. National Labor Relations Board

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

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I. INTRODUCTION

The government has never met its burden to show that Siems' protected, concerted activity was a motivating factor in his termination. Nothing supports a conclusion Siems was terminated in response to a work stoppage. Siems played no real role in the work stoppage, the timing of the incident that led to Siems' termination was completely out of Katch Kan's control, and other employees who played actual roles in the work stoppage were not disciplined. Further, Siems' actions show that Katch Kan had a legitimate belief that he had previously accepted the assignment, prior to backing out at the last minute.

Ultimately, ***Siems could have accepted the assignment he had been selected for, and he would not have been terminated***. The government's theory makes no sense. According to the government, Katch Kan purportedly used a situation in which Siems had the power to control his own destiny for the purpose of orchestrating his removal from the Company. For all the reasons outlined in Petitioner's Brief and below, the decision of the National Labor Relations Board in this matter should not be enforced.

II. ARGUMENT

A. <u>The Board's order is not supported by substantial evidence.</u>

"According to Ramsey, the trip remained voluntary."

NLRB's Br. 4 (quoting Tr. 138).

The quote above epitomizes the government's cavalier attitude toward the evidence. The trip was voluntary *at the outset* but the evidence also shows that Siems then agreed to undertake the trip. In fact, Ramsey said originally he was looking for volunteers to go on this trip but "once he [Siems] accepted and we started processing his paperwork and spending money on him, it became no longer optional." (Tr. 138.)

The government does not, and cannot, point to any evidence that Katch Kan's decision to hold Siems to his commitment to take the trip was a pretext for retaliation against him for engaging in protected concerted activity. Instead, logic and the facts demonstrate Siems was terminated for the same reason individuals lose their jobs every day: he refused to perform his job duties after assuming responsibility for them. There is no evidence of an unlawful motive for Siems' termination, and the NLRB can only rely weakly on timelines to infer such a motive. But an unlawful purpose is not lightly to be inferred, *Federal-Mogul Corporation v. NLRB*, 566 F.2d 1245, 1260 (5th Cir. 1978). Mere suspicions of unlawful motivation are not substantial evidence. *Id.*

In *NLRB v. Mini-Togs, Inc.*, 980 F.2d 1027 (5th Cir. 1993), this Court found that substantial evidence did not exist to uphold the Board's determination that an employee's termination for abusive language at work was merely a pretext for her union activity. In this case, just as in *Mini-Togs*, the evidence shows in fact that

Siems "fired himself" when he "refused reasonable conditions for continued employment. *Id*. at 1034.

Siems may not have wanted to go to Saudi Arabia, and he may have had reservations about going, but that is not the point. Katch Kan believed in good faith that Siems had committed to the trip. He was part of a team of technicians picked specifically to win big business through Saudi Aramco. Siems reneged on his employer's legitimate offer of overseas assignment after committing to the team through his actions that he was ready to go.

It is the government's burden to show by a preponderance of the evidence that Siems was engaging in protected activity; that Katch Kan had knowledge of the activity; that adverse action was taken against Siems; and that his activity was a motivating factor in the decision to discipline him. *United Rentals,* 350 NLRB 951 (2007); *Bridgestone Firestone S.C.,* 350 NLRB 526, 529 (2007). The government still points to no evidence to support any possible inference that Siems' protected activity was a "motivating" factor in the decision to terminate him. The only purported evidence of causation the government cites is that Siems' termination occurred within two weeks of a work stoppage and that some witnesses testified about the way Ramsey reacted after a stray comment during four hours of tense negotiations. The government relies upon three key arguments, none of which are supported by substantial evidence.

1. Siems was not the "ringleader" of the work stoppage.

The government's case is built on faulty foundations that will not hold. For instance, the government's case begins with the assertion that Tanner Siems somehow distinguished himself during a one-day work stoppage, even though all the evidence in the record shows that Siems did no such thing. (Opening Br. 15-16.)

The government highlights cases related to protected activity. It cites cases regarding the timing of the discipline and cases related to disparate treatment or discipline that deviates from past practice, and inconsistencies between the employer's proffered reason for the action and other actions of that employer. (NLRB's Br. 18-19.) But there is no evidence here that Katch Kan's actions deviated from past practice, nor can it be said Katch Kan behaved in a discriminatory manner. The evidence is to the contrary. In fact, several other union supporters played bigger roles in the work stoppage than Siems and *they received no discipline of any kind*.

In light of the government's theory Ramsey was motivated by retaliatory animus, the government attempts unsuccessfully to conjure a theory differentiating Siems from the numerous other employees who participated in the work stoppage and against whom Ramsey took no action.

First the government tries to make Siems' participation in the July 28 work stoppage appear greater than it was. "In particular, Siems was the one who spoke

up for the group of employees and directly rejected Ramsey's offer to take his word about a compromise, telling Ramsey in front of all the employees that Ramsey's word was untrustworthy and insisting that management commit its promise of a compromise to writing before the employees would return to work." (NLRB's Br. 21.) Next the government states that Ramsey held animus towards the employees engaged in the protected activity, "especially Siems." (NLRB's Br. 26).

But these statements in the government's brief are belied by the testimony of the government's own witnesses before the ALJ. The record testimony shows it was Barrows who, according to his own testimony, first stood up and told his supervisor he would not go to work until the schedule issue was resolved. (Tr. 20:4-8). Barrows also testified that members of the group, himself included, demanded the agreement in writing. (Tr. 21:21-24). The evidence shows the Company acceded to the employee's demands and negotiated with them over the seven-on/seven-off schedule. (Tr. 132:7-13). If any one employee would have had a target on his back for this work stoppage, it would have been Barrows. But there is no evidence that Barrows – or any other employee who participated in the work stoppage – suffered any adverse employment consequences because of their participation in this work stoppage and dispute.

During a three or four hour work stoppage, Siems did nothing to stand out and was not even a vocal leader of the work stoppage. Indeed, according to the

record, no one from management ever asked Siems individually if he would go out to a rig that day.

In light of the uncontested evidence of ***non***-retaliation against Barrows or anyone else, the government is left arguing that Siems' alleged comments that Ramsey's word "isn't worth shit" somehow focused all of Ramsey's purported retaliatory rage on him rather than Barrows or anyone else. But this is far too slender a reed to support the Board's finding of unlawful retaliation against Siems.

Although the ALJ in this matter was charged with making witness credibility determinations, Katch Kan's argument is not related to witness credibility. The issue is whether the ALJ's finding that the statement, even if made by Siems and even if heard by Ramsey, caused Ramsey to terminate Siems' employment despite Ramsey's not retaliating against anyone else who engaged in the work stoppage.

While testimony did vary concerning Ramsey's reaction to this alleged statement, the ALJ and the Board both refused to review the <u>actions</u> of Ramsey that provide important context. Siems testified that after the meeting ended and the employees returned to work, Ramsey pulled him aside. (Tr. 47:23-48:3). During that conversation, Ramsey let him know that he had picked Siems specifically for a previously discussed assignment in Saudi Arabia because of his good work ethic and to prevent him from losing money due to the proposed scheduling changes. *Id.*

The government ignores this context, which refutes any inference Ramsey harbored ill will directed exclusively at Siems.

Finally, the government contends that Katch Kan created a new argument on appeal, an argument that highlights a "shifting" explanation for Siems' termination. The government's argument and logic on this issue are misplaced. Katch Kan did note that while the ALJ might credit one witness's testimony over another's, it seems implausible that an individual, allegedly angered by comments from an employee, would immediately pull him aside after the statements were made and talk to him about a job opportunity. The implausibility of the ALJ's rationale was further highlighted by the fact that Siems' alleged statements were not beyond the pale of normal speech in the work atmosphere in this case.

The government contends that Katch Kan's assessment of the work environment is somehow a new, "shifting explanation" for Siems' discharge and then quotes several cases that stand for the proposition that shifting explanations for a discharge may be evidence, in and of themselves, of a bad motive. (NLRB's Br. 27). The government misconstrues the argument. Katch Kan's discussion of the workplace is not a new explanation for the termination. Katch Kan is not now arguing that Siems was terminated because of his "shop talk" but is instead arguing that the ALJ failed to take into account the fact that saying "right now, your word isn't worth shit" would ***not*** be a particularly egregious statement in a Texas oil rig

maintenance company. That fact, coupled with Ramsey's behavior towards Siems after the work stoppage, leads to the conclusion Ramsey in fact harbored no ill will towards Siems because of his alleged comments, contrary to the government's speculation for why Ramsey allegedly felt retaliatory bias against Siems but no one else.

2. Katch Kan had no control over Saudi Aramco's actions.

There is absolutely no evidence to support any allegation or inference that Saudi Aramco and Katch Kan were working in concert to terminate Siems for engaging in protected concerted activity. The ALJ acknowledged Saudi Aramco exercised significant control over the travel process, yet found that Katch Kan's shifting travel dates somehow bolstered the government's pretext argument. (R. 301.)

But the evidence shows that Saudi Aramco, not Katch Kan, continually revised the departure date for this project. First, Saudi Aramco wanted the team in Saudi Arabia in September 2014, but then revised its plan. (Tr. 208:10-16; 233:15-25; 216:14-217:6; 153:19-154:1). Additionally, the Katch Kan employees selected for the Saudi Arabian assignment had to go to Canada for specialized training. (Tr. 138:8-12; 139:5-20). Next, Saudi Aramco demanded Katch Kan's equipment ship to Saudi Arabia prior to the team's arrival. (Resp't Ex. 10). The equipment arrived in late September. *Id*. Then Saudi Aramco pushed the employee arrival date back from September to November. *Id*. Finally, after several additional delays by Saudi

Aramco, they requested a single Katch Kan employee, who left for Saudi Arabia on February 15, 2015. (Resp't Ex. 11). In the interim time period, Katch Kan's international team, selected by Ramsey, traveled to several other sites including Canada, China, and Kenya. (Tr. 211:19-212:6).

Just as there is no evidence that Saudi Aramco was complicit in some hidden scheme to terminate Siems, there is no evidence in the record to suggest Ramsey or Katch Kan knew of Saudi Aramco's schedule changes beforehand or controlled them. The idea that Katch Kan jumped at the opportunity to fire Siems because of Saudi Aramco's demands is especially improbable.

3. Siems' termination was not pretextual.

The standard of review in this case is well settled: the Court should sustain the Board's determinations only if they are supported by substantial evidence on the record considered as a whole. *NLRB v. Brown*, 380 U.S. 278, (1965); *International Organization of Masters, Mates and Pilots v. NLRB*, 539 F.2d 554 (5th Cir. 1976). However, this Court should deny enforcement if, after a full review of the record, it is unable conscientiously to conclude that the evidence supporting the Board's determinations is substantial. *NLRB v. Mueller Brass Co.*, 509 F.2d 704, 707 (5th Cir. 1975); *NLRB v. O. A. Fuller Super Markets, Inc.*, 374 F.2d 197, 200 (5th Cir. 1967).

It is also well settled that substantial evidence on the record as a whole must exist to support an inference of unlawful employer motivation in the discharge of an employee. *Fed.-Mogul Corp. v. NLRB*, 566 F.2d 1245, 1260 (5th Cir. 1978). An unlawful purpose is not to be lightly inferred. *Id*. The government relies upon several unrelated assertions to support its conclusion that Katch Kan's rationale for Siems' termination was pretextual. None of these assertions is supported by the record.

First, the government found that temporal proximity was an indicator of improper motive. This is the only assertion the government might be able to factually support. However, the government ignores the undisputed fact that the timing of Siems' termination is based entirely upon events outside its control and entirely within Siems' control. All Siems had to do to save his job was say that, yes, he would follow through on his commitment to take the Saudi Arbian assignment.

The government makes much of the fact Siems was terminated 11 days after the work stoppage. But the chain of events leading towards that termination - a last-minute trip to Canada for training requested by Katch Kan's client, Saudi Aramco – was put into motion by the client. (Opening Br. 8.) Katch Kan did not make up the request, it only acted upon it. According to the government's theory, Katch Kan went looking for a pretextual reason to terminate Siems but not any other union supporters. And according to the government's tortured theory, Katch

Kan lucked into receiving a request from its client for the very team that included Siems to travel immediately to Canada for training, and Katch Kan was further lucky enough to have Siems turn down that assignment so that it could pretextually fire him for unrelated reasons. None of this is plausible, let alone supported by evidence.

Throughout the process of preparing for the Saudi Arabian assignment, it is clear Saudi Aramco controlled the relationship and that Katch Kan needed flexibility to be ready to service the major new client quickly. (Tr. 208:10-16; Tr. 216:11-12). At the same time, Ramsey selected some of his best employees, including Siems, for this new international team, and he made offers and hired new employees to replace the four people selected for the team. (GC Exs. 6-13). As the ALJ found " the evidence establishes that [Katch Kan] made written job offers to eight individuals at about this time: four as lead installers at nineteen dollars an hour, and four as junior installers at fifteen dollars an hour." (R. 300). Two of the offers to the new lead installers (the position that Siems held) were accepted by the new employees on August 7. One other lead installer accepted an offer on August 20. (*Id*.) Based on Katch Kan's belief at the time, it needed installers because Siems and the others would be overseas.

Second, the government and the Board focused entirely on what Siems said. "Siems never said he'd be willing to go." (NLRB's Br. 23). "Siems…consistently

remained noncommittal each time he was asked about the trip." (*Id*.) But Siems' actions belied his allegedly "noncommittal" stance. It is undisputed that Siems obtained a passport and that he later told Katch Kan that he was "***no longer able to go.***" (GC Ex. 2 (emphasis added).) Siems also stated that he was "***sorry for any inconvenience***." (*Id.* (emphasis added).) If Siems had never agreed to go, why apologize and why would there be any inconvenience? While Siems may have testified after he'd been fired and after he'd filed an unfair labor practice charge that he had always been noncommittal, the evidence shows he did in fact commit.

While the parties dispute whether Siems fully and finally committed to the Saudi trip, the record testimony also shows without dispute that Ramsey ***believed*** Siems had committed and Siems' actions were consistent with Ramsey's belief. (Tr. 142:1-4). For example, Siems had requested an expedited passport on July 22, 2014. (Tr. 51:9-11). Katch Kan believed Siems was committed to the Saudi Arabian assignment. It relied on that belief to hire replacement employees to take over the work of Siems and the other three individuals chosen for the team. (GC Exs. 6-13). While Siems claimed he never fully committed that he would go to Saudi Arabia, there is no dispute that Siems obtained his passport for the trip. (Tr. 51:4-5, 9.)

Third, there is no evidence that Katch Kan knew of the statements Siems made to Ramsey on July 28. It is incumbent upon the General Counsel of the

Board to prove unlawful conduct and an unlawful purpose is not lightly to be inferred. "In the choice between lawful and unlawful motives, the record taken as a whole must present a substantial basis of believable evidence pointing toward the unlawful one." *NLRB v. McGahey*, 233 F.2d 406, 413 (5th Cir. 1956). (Emphasis in the text.) Seemingly arbitrary discharges, even if harsh and unreasonable, are not unlawful unless motivated by a desire to discourage protected union activity."

While Ramsey denies hearing the purported comments from Siems, even if the ALJ credited the witness testimony in contrast to that, there is no evidence that Ramsey ever told Todd about those statements. While the government states that "Katch Kan was well aware of this conduct because it occurred during the July 28 meeting in front of Ramsey, and Ramsey reported the events to Todd as he sought to get employees to return to work." (NLRB's Br. 21 (citing Tr. 132).) But there is absolutely no evidence that Todd ever knew about this alleged stray remark from Siem's about Ramsey's "word". To believe the government's position, this Court would have to conclude that Ramsey told Todd of the comments, a fact not in the record, and that there was a conspiracy to terminate Siems between Ramsey, Todd and Katch Kan's attorney Peter Dawson. This would not be mere inference, but rather rank speculation.

At the end of the day, the evidence tells a simple story: Siems was terminated because he backed out of his commitment to take a job assignment on the ap-

parent eve of that assignment getting started. This simple story is supported by the evidence, unlike the government's elaborate and unpersuasive theory, which requires implausible inference upon implausible inference.

III. CONCLUSION

The government has the burden of proof in this matter. The evidence in the record does not support a finding that Katch Kan terminated Siems because of his protected activity. The NLRB's decision does not conform with the evidence in the record and this Court should decline to enforce the Board's order.

Respectfully submitted,

by: s/Christopher C. Murray

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CERTIFICATE OF SERVICE

I certify that on this 1st day of April 2016, I caused this REPLY BRIEF FOR PETITIONER/CROSS-RESPONDENT, KATCH KAN USA, L.L.C. to be filed electronically with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to the following registered CM/ECF users properly addressed to the following:

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CERTIFICATE OF COMPLIANCE

Pursuant to FED. R. APP. P. 32(a)(7)(C) and 5TH CIR. R. 32.3, I certify that this Reply Brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this Brief contains 3,196 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

I further certify that this Brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this Brief has been prepared using Times New Roman 14-point font, a proportionately spaced typeface.

Dated this 1st day of April, 2016.

OGLETREE, DEAKINS, NASH, SMOAK, & STEWART P.C.

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